Capital Corp Securities Sdn Bhd v Abdul Malek Beh bin Abdullah

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–1176 OF 1999
ABDUL MALIK ISHAK J
3 MARCH 2005

Securities — Margin account — Contra losses — Force selling due to drop in current equity ratio — Whether defendant entitled to sale proceeds of 30% — Construction of margin trading facility agreement

Securities — Margin account — Contra losses — Force selling due to drop in current equity ratio — Whether force selling delayed — Whether breach of KLSE rules invalidate contract between stockbroking company and remiser — KLSE Rules For Trading By Member Companies r 20(10) & (15)

Securities — Remiser — Relationship with stockbroking company — Whether contractual and fiduciary relationship — Construction of margin trading facility agreement — Whether stock broking company under obligation to wait for share prices to rise in force selling

The plaintiff was a stockbroking company with whom the defendant maintained a margin account. The salient terms of the margin trading facility agreement were: (a) the defendant to pay the plaintiff for any losses arising in his margin account; (b) that if the current equity ratio was below 130%, the plaintiff could sell or realise the securities upon such terms and conditions as the plaintiff thinks fit, so that the current equity ratio could be maintained; and (c) that if the current equity ratio dropped below the required equity ratio of 165%, the plaintiff was entitled to make a margin call and the defendant was required to return the current equity ratio within two days from the date of the margin call.

The plaintiff's case was that the plaintiff had made the requisite margin call when the equity ratio fell to 164.74% and in mid November 1997 the equity ratio dropped to 130% and therefore, force-selling had commenced on 4 December 1997. There were contra losses due to the plaintiff and the margin facility given to the defendant had been terminated on 29 April 1998 and that the plaintiff had demanded for the losses. The plaintiff submitted that the evidence of PW1 coupled with PW1's witness statement in 'PWS–1' as well as the documentary evidence had established a case against the defendant.

The defendant however submitted that the plaintiff had delayed to force-sell the shares and this had resulted in the accrual of the contra losses. The defendant further submitted that the margin facility agreement had been prepared in compliance with and were governed by r 20(10) of the KLSE Rules For Trading By Member Companies ('the KLSE rules') and therefore, according to the KLSE rules a member company shall not permit the equity in any

client's margin account to fall below 130% of the outstanding balance. That r 20(15) of the KLSE Rules For Trading By Member Companies further states that in the event that the equity falls below 130% of the outstanding balance, the member company shall have absolute discretion and, without notice to its client, liquidate his margin account, including the securities purchased and carried in such account, so that the equity is not less than 150% of the outstanding balance. The defendant said that the breach of the KLSE rules by the plaintiff would become a breach of contract between the plaintiff and the defendant.

The defendant also pleaded that the plaintiff owed a fiduciary duty and not merely a contractual obligation to the defendant. It was the contention of the defendant that he was entitled to the sale proceeds in the region of 30%. Therefore, the defendant raised the following issues: (1) that there could not be a claim for contra losses as prayed for by the plaintiff; (2) that the plaintiff had failed to produce evidence of force-selling of the shares; and (3) that the plaintiff did not force-sell the shares in the account of the defendant.

Held, granting judgment for the plaintiff and dismissing the defendant's counterclaim:

(1) Taking the *viva voce* evidence of PW1 together with the documentary evidence, it was clear that the plaintiff's claim against the defendant had been established (see para 26). Thus, the burden shifted onto the defendant to disprove the plaintiff's case (see para 30).

(2) Force-selling of the shares were not delayed till April 1998 or July 1998 but, in fact, it had commenced on 4 December 1997. No challenge was mounted against PW1's testimony that force-selling had indeed commenced on 4 December 1997. The failure to challenge the testimony of PW1 amounted to an abject acceptance of the same (see para 44).

(3) The plaintiff was under no obligation whatsoever, whether contractually or legally, to wait for the share prices to rise. The shares were required to be sold at the prevailing market price and that was indeed done on 4December 1997. Anyway, the failure to liquidate the margin account cannot constitute a defence to the claim and that the rules of trading as set out in the KLSE rules gave an absolute discretion to decide whether and when to force-sell without giving any notice (see para 46).

(4) The issuance of exhs P7, P8 and P9 and the commencement of force-selling on 4 December 1997 clearly showed that efforts were taken by the plaintiff to liquidate the defendant's margin account. Upon discovery that his trades had caused losses to his account, the defendant merely remained silent after receiving the monthly statements as per exh P5, and now the defendant had chosen to make a bare and categorical denial of any responsibility. That did not augur well for the defendant (see para 49).

(5) The onus of rectifying the account lay with the defendant himself and he has miserably failed to do so. The defendant had failed to adduce any evidence to show that reasonable efforts have been made by him to ensure that the plaintiff did force-sell the shares in accordance with the rules and regulations of the KLSE. In any event, a breach of the rules and regulations of the KLSE did not invalidate a contract between the defendant and the plaintiff or any contract or share transaction entered into by the parties thereto (see para 58).

(6) There existed the unrebutted presumption that the contract notes and monthly statements were sent out to the defendant in the ordinary course of the plaintiff business (see para 63). It was inherently improbable that the defendant did not receive the contract notes and the monthly statements (see para 64).

(7) There was no basis for the defendant's counterclaim for 30% of the sale proceeds and it was unsupported by any document. For these reasons, the defendant's counterclaim must be dismissed forthwith with costs (see para 70).

(8) The evidence showed that the plaintiff had produced evidence of force-selling (see para 77).

(9) The facts leaned in favour of a contractual relationship between the plaintiff and the defendant. This was clearly borne out by the contracts executed between the plaintiff and the defendant (see para 59). The defendant had failed to show how the plaintiff had not acted in the best interest of the defendant when the shares were force-sold on 4 December 1997 (see para 88). In fact, the plaintiff had shown that it had taken the necessary steps to liquidate the defendant's account upon the shortfall of the collateral. What was in effect a contractual relationship between the plaintiff and the defendant on the strength of the margin trading facility agreement had been misconstrued by the defendant as a fiduciary relationship. Their relationship was entirely contractual in nature (see para 86).

[**Bahasa Malaysia summary**

Plaintif merupakan sebuah syarikat broker saham di mana defendan telah mengendalikan satu akaun margin. Terma-terma perjanjian kemudahan perniagaan margin itu adalah bahawa: (a) defendan membayar plaintif untuk sebarang kerugian yang dialami dalam akaun margin itu; (b) sekiranya ratio ekuiti terkini adalah di bawah 130%, plaintif boleh menjual sekuriti-sekuriti di atas terma-terma dan syarat-syarat seperti mana plaintif fikirkan patut; dan (c) sekiranya ratio ekuiti terkini jatuh di bawah ratio ekuiti yang ditentukan iaitu 165%, plaintif berhak untuk membuat panggilan margin dan defendan dikehendaki memulangkan ratio ekuiti terkini dalam masa dua hari daripada tarikh panggilan margin itu.

Kes plaintif adalah bahawa plaintif telah membuat panggilan margin itu apabila ratio ekuiti itu jatuh di bawah 164.74% dan pada pertengahan November 1997 ratio ekuiti telah jatuh ke 130% maka penjualan secara paksa telah dimulakan pada 4 Disember 1997. Terdapat kerugian kontra yang dialami plaintif dan kemudahan margin yang telah diberikan kepada defendan tidak ditamatkan pada 29 April 1998 dan plaintif menuntut untuk kerugian. Plaintif menyatakan bahawa keterangan PW1 bersama pernyataan saksi PW1 dalam PWS-1 dan juga keterangan dokumen telah membuktikan kes terhadap defendan.

Defendan walau bagaimana pun menyatakan bahawa plaintif telah melambatkan penjualan secara paksa saham-saham itu dan telah mengakibatkan kerugian kontra itu. Defendan juga menyatakan bahawa perjanjian kemudahan margin telah disediakan mengikut r 20(10) Kaedah-Kaedah Bursa Saham Kuala Lumpur yang mandatori ('kaedah-kaedah BSKL') dan maka mengikut kaedah-kaedah BSKL, syarikat ahli tidak boleh membenarkan ekuiti dalam akaun margin mana-mana klien mereka jatuh di bawah 130% jumlah tertunggak. Kaedah 20(15) BSKL juga menyatakan sekiranya ekuiti jatuh bawah 130% jumlah tertunggak, syarikat ahli mempunyai budi bicara yang mutlak, tanpa notis kepada klien untuk melikuidasikan akaun margin itu termasuk sekuriti-sekuriti yang dibeli dan dikendalikan dalam akaun agar ekuiti tidak kurang daripada 150% jumlah tertunggak. Defendan mengatakan bahawa kemungkiran kaedah-kaedah BSKL oleh plaintif akan menjadi kemungkiran kontrak di antara plaintif dan defendan.

Defendan juga menuntut bahawa plaintif mempunyai tanggungjawab fidusiari dan bukan sahaja tanggungjawab kontraktual terhadap defendan. Adalah hujah defendan bahawa beliau berhak kepada keuntungan penjualan itu sebayak 30%. Maka defendan membangkitkan isu-isu seterusnya: (1) tiada tuntutan untuk kerugian kontra seperti yang dituntut oleh plaintif; (2) plaintif gagal membuktikan penjualan secara paksa saham-saham itu; dan (3) bahawa plaintif tidak menjual paksa saham-saham dalam akaun defendan.

Diputuskan, memberi perintah untuk plaintiff dan menolak tuntuan balas defendan:

(1) Mengambil viva voce keterangan PW1 bersama dengan keterangan dokumen, adalah jelas bahawa tuntutan plaintif terhadap defendan telah dibuktikan (lihat perenggan 26). Oleh itu, beban bukti adalah di atas defendan untuk membangkang kes plaintif (lihat perenggan 30).

(3) Penjualan paksa saham-saham itu tidak dilambatkan sehingga April 1998 atau Julai 1998 tetapi fakta adalah ia di mulakan pada 4 Disember 1997. Tiada bantahan terhadap penyataan PW1 bahawa penjualan paksa sememangnya bermula pada 4 Disember 1997. Kegagalan untuk membantah penyataan PW1 berjumlah kepada penerimaan penyataan itu (lihat perenggan 44).

(3) Plaintif tidak ada apa-apa obligasi, sama ada secara kontraktual atau undang-undang untuk menunggu sehingga harga saham naik. Saham-

saham itu dikehendaki dijual pada harga pasaran pada masa itu dan telah dibuat pada 4 Disember 1997. Kegagalan untuk melikuidasikan akaun margin itu bukan satu pembelaan kepada tuntutan itu dan kaedah-kaedah perniagaan seperti yang diperuntukkan dalam kaedah-kaedah BSKL memberi satu-satunya budi bicara mutlak untuk memutuskan sama ada dan bila untuk menjual paksa tanpa memberi sebarang notis (lihat perenggan 46).

(4) Penyampaian eks P7, P8 dan P9 dan permulaan jual-paksa pada 4 Disember 1997 jelas menunjukkan bahawa langkah-langkah telah diambil oleh plaintif untuk melikuidasikan akaun margin defendan. Setelah penemuan telah dibuat bahawa perniagaannya telah mengakibatkan kerugian kepada akaunnya, defendan sekadar berdiam diri setelah menerima penyataan bulanan seperti dalam eks P5, dan sekarang defendan memilih untuk membuat penafian tidak berdasar sebarang tanggungjawabnya. Ini tidak membantu defendan sekalipun (lihat perenggan 49)

(5) Tanggungjawab membetulkan akaun itu adalah tanggungjawab defendan sendiri dan beliau gagal membuat demikian. Defendan gagal menunjukkan sebarang keterangan untuk menunjukan bahawa langkah-langkah munasabah telah diambil olehnya untuk memastikan bahawa plaintif menjual-paksa saham-saham berdasarkan kaedah-kaedah dan peruntukan-peruntukan BSKL. Bagaimana pun, kemungkiran kaedah-kaedah dan peruntukan-peruntukan BSKL tidak membuat kontrak di antara defendan dan plaintif atau apa-apa kontrak atau transaksi saham-saham di antara defendan dan plaintif tidak sah (lihat perenggan 58).

(6) Wujud anggapan tidak ditentang bahawa nota kontrak dan penyata bulanan telah dikirim kepada defendan mengikut urusan perniagaan biasa (lihat perenggan 63). Adalah tidak berkemungkinan bahawa defendan tidak menerima nota kontrak dan penyata bulanan (lihat perenggan 64)

(7) Tiada dasar bagi tuntutan balas defendan untuk 30% daripada keuntungan jualan itu dan ia tidak disokong oleh apa-apa dokumen. Berdasarkan sebab-sebab ini, tuntutan balas defendan ditolak dengan kos (lihat perenggan 70).

(8) Keterangan menunjukkan bahawa plaintif telah mengemukakan keterangan jual paksa (lihat perenggan 77).

(9) Fakta-fakta menyebelahi perhubungan kontraktual plaintif dan defendan. Ini jelas dinyatakan dalam kontrak yang dimasuki plaintif dan defendan (lihat perenggan 59). Defendan gagal menunjukkan bagaimana plaintif tidak mengambilkira kebaikan defendan apabila saham-saham dijual paksa pada 4 Disember 1997 (lihat perenggan 88). Dalam fakta, plaintif telah menunjukkan bahawa langkah-langkah telah di ambil untuk melikuidasikan akaun defendan setelah didapati terdapat kekurangan dalam jaminan itu. Apa yang sebenarnya satu perhubungan kontraktual

di antara plaintif dan defendan atas kekuatan perjanjian kemudahan perniagaan margin telah disalah faham oleh defendan sebagai satu perhubungan fidusiari. Perhubungan mereka adalah secara keseluruhannya bersifat kontraktual (lihat perenggan 86).]

Notes

For a case on margin account generally, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) para 873.
For cases on relationship with stockbroking company, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 876–878.

Cases referred to

AE Carapiet v AY Derderian (1961) Cal 359 (refd)
Akberdin Hj Abdul Kader & Anor v Majlis Peguam Malaysia [2002] 4 CLJ 689 (refd)
Armstrong v Jackson [1917] 2 KB 822 (refd)
Bonds & Securities (Trading) Pty Ltd v Glomex Mines NL & Ors [1971] 1 NSWLR 879 (refd)
Chuan Hup Agencies Pte Ltd v Global Minerals (Sarawak) Sdn Bhd [1990] 1 MLJ 305 (refd)
Coulson v Disborough [1894] 2 QB 316 (refd)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156 (refd)
Love v Mack (1905) 93 LT 352 (refd)
Mechanical & General Inventions Co Ltd v Austin [1935] AC 346 (refd)
New acres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 AMR 1730 (refd)
OCBC Securities Pte Ltd v Yeo Siew Huan 2 [1998] SLR 965 (refd)
Pole v Leask (1863) 33 LJ Ch 155 (refd)
R v Cliburn (1898) 62 JP 232 (refd)
R v Doolin (1882) 1 Jebb CC 123 (refd)
R v Kalia [1975] Crim LR 181 (refd)
R v Matheson [1958] 1 WLR 474 (refd)
R v Roncoli [1998] Crim LR 584 (refd)
R v Sharp [1993] 3 All ER 225 (refd)
R v Sweet-Escott [1971] 55 Cr App R 316 (refd)
R v Tregear [1967] 2 QB 574 (refd)
Rothschild v Brookman (1831) 5 Bli NS 165 (refd)
Rush v Smith (1834) 1 Cr M&R 94 (refd)
Shaw v Woodcock (1827) 7 B&C 73 (refd)
Summers v Moseley (1834) 2 Cr & M 477 (refd)
Syarikat Soon Theam Sdn v H'ng Chye Jin [1975] 1 MLJ 259 (refd)
TA Securities Bhd v Lee Wai Ying (P) [1999] MLJU 394 (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697 (refd)
Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253 (refd)
UMBC Securities Sdn Bhd v Tan Chee Aan [2001] 3 AMR 2958 (refd)
Wakelin v London and South Western Railway Co (1886) 12 App Cas 41 (refd)
Wong Swee Chin v Public Prosecutor [1981] 1 MLJ 212 (refd)

A *Wood v Mackinson* (1840) 2 Mood & R 273 (refd)
Yii Ming Sung v Sarawak Securities Sdn Bhd (2000) 1 LNS 38 (refd)
YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd 2 [1997] MLJ 621 (refd)

B **Legislation referred to**

Evidence Act 1950 ss 137, 138
Rules of the High Court 1980 O 15 r 5(2)

Rajita Suntharalingam (Skrine) for the plaintiff.
Zamzuri Mohd Husin (Foo Say Ghee & Zamzuri) for the defendant.

C

Abdul Malik Ishak J:

THE BROKER AND CLIENT RELATIONSHIP

D **[1]** It is said that the relationship between a broker and his client is of a fiduciary character. But it is not in the strict sense of a trustee and his *cestui qui trust*. Everything would be dependent on the facts of each case. And the relationship may be entirely contractual in nature, just like the present case at hand. A broker has been described as a buying or selling agent in the market for a particular client who is the principal. Chang Min Tat J in *Syarikat Soon Theam Sdn v H'ng Chye Jin* [1975] 1 MLJ 259 at p 260 defined the meaning of a sharebroker in this way:

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> A sharebroker is by his designation not a contracting party but is an agent who arranges for the 'marriage' of an offer to buy with an offer to sell.

F **[2]** Judges in other jurisdictions have commented on the general character of a sharebroker's business and his relationship with his client. Lord Wynford in *Rothschild v Brookman* (1831) 5 Bli NS 165 was one of them. The other would be McCardie J in *Armstrong v Jackson* [1917] 2 KB 822. Perhaps the best observation and comment came from Street J in *Bonds & Securities (Trading) Pty Ltd v Glomex Mines NL & Ors* [1971] 1 NSWLR 879 at p 889 when his Lordship said:

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> The occupation of sharebroking demands high standards of integrity. In carrying on his occupation, a sharebroker acts, not for himself, but for his client. His remuneration is his brokerage, or commission. Clients, some with great, others with little, business acumen and ability to protect themselves, seek and act on his advice and permit him to handle their money and their shares. Those clients are entitled to expect from a broker not only competence, but also integrity and absence of conflicting personal interests. His position is one of trust and responsibility. By the recognition and pursuit of the high traditions of their occupation brokers have aspired to the status of an honourable profession.

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I **[3]** With these brief principles of law, I will now proceed to narrate the facts of the case pieced together after a full trial.

FACTS OF THE CASE

[4] The plaintiff is a stockbroking company with whom the defendant maintained a margin account identified as DAD 363. By a letter of offer dated 29 January 1997 and a margin trading facility agreement as per exh P4 executed between the plaintiff and the defendant (as per the agreed facts in bundle 'B'), the plaintiff granted to the defendant a margin trading facilitywith a limit of RM600,000 which was then subsequently increased to RM750,000.

[5] The salient terms of the margin trading facility agreement which the defendant agreed to and as seen at p 23 of the notes of proceedings where the defendant was being cross-examined may be summarised in this way:

(a) to pay the plaintiff for any losses arising in his margin account;

(b) that if the current equity ratio is below 130%, the plaintiff can sell or realise the securities upon such terms and conditions as the plaintiff thinks fit, so that the current equity ratio can be maintained;

(c) that if the current equity ratio drops below the required equity ratio of 165%, the plaintiff is entitled to make a margin call and the defendant is required to return the current equity ratio within two days from the date of the margin call; and

(d) that the defendant would pay the relevant interest which accrues on these transactions.

[6] Now, on or about 7 November 1997, the current equity ratio of the defendant's account deteriorated to a level below 130% as per the agreed facts in bundle 'B'. A margin call notice dated 7 November 1997 as per exh P7 was issued to the defendant notifying him that he was to restore and rectify the current equity ratio. It seems that the defendant merely ignored the plaintiffs margin call notice and so we have the situation where the defendant has failed to rectify the current equity ratio. By a letter dated as seen at exh P8, the plaintiff terminated the margin trading facility and demanded immediate repayment of the sums due from the defendant to the plaintiff. Again, through a letter of demand dated as reflected at exh P10, the plaintiff demanded payment of the sums owing under the margin trading facility but the defendant refused to make such payment.

OBSERVATIONS

[7] The following issues have been abandoned by the parties in the course of the trial:

(1) whether the plaintiff is still carrying on its business in the name and address as stated in the statement of claim?;

(2) whether the defendant has entered into a margin trading facility agreement?;

(3) whether the plaintiff needs to explain clearly to the defendant as to the terms and conditions of the margin trading facility agreement in the statement of claim even though these terms are already contained in the said agreement?;

(4) whether a margin call by the plaintiff ought to have been made when the current equity ratio reached 165% or after it dropped below 130%;

(5) whether the margin call notice was issued by the plaintiff?; and

(6) if the margin call notice was issued by the plaintiff, whether such notice is still valid?

[8] And the abovementioned issues have become irrelevant for the following reasons:

(i) no evidence was tendered during the trial of the action in regard to these issues;

(ii) these issues were not raised during the cross-examination of PW1 — referring to the witness by the name of Mohamad Zahar bin Mohamad Sharif, as well as during the examination-in-chief of DW1 — referring to the defendant himself who testifies on behalf of himself;

(iii) these issues are deemed admitted by virtue of para 3 of the amended defence and counterclaim;

(iv) these issues are deemed admitted by virtue of para 7 of the defendant's witness statement marked as 'DWS–1'; and

(v) these issues have been admitted by the defendant in the course of his submission before this court.

[9] That certainly made life easier for me. Nevertheless, the trial proceeded as scheduled and the parties had their day in court.

[10] Be that as it may, the crucial issues for determination may be stated in these words:

(1) whether the plaintiffs conduct in respect of the defendant's account is bound by the rules and regulations of the KLSE — referring to the Kuala Lumpur Stock Exchange?;

(2) whether the plaintiff's duty to the defendant is fiduciary or contractual in nature?

(3) whether the defendant has any knowledge that the current equity ratio has depreciated below 130% on 7 November 1997; and

(4) whether the plaintiff ought to force-sell all the securities pledged under the margin trading account upon the fall of the current equity ratio to the level of 130% or lower?

[11] As I see it, the plaintiff relies on the oral testimony of its witness, namely, PW1 together with the witness statement of PW1 marked as 'PWS–1'. The plaintiff too relies on the documentary evidence.

[12] I shall now proceed to the heart of the matter.

THE TESTIMONY OF PW1 BY THE NAME OF MOHAMAD ZAHAR BIN MOHAMAD SHARIF

[13] The witness statement of PW1 as per 'PWS–1' bears the following salient evidence that merits repetition:

(a) that the defendant had utilised a margin account for the purposes of buying and selling shares (Question 13 of 'PWS–1');

(b) that the account number accorded to the defendant is DAD 363 (Question 18 of 'PWS–1'); and

(c) that the terms and conditions in the margin trading facility agreement as reflected in exhibit P4 regulates the conduct of the margin account (Question 25 of 'PWS–1').

[14] PW1 testified that the defendant traded by utilising the margin account (Question 28 of 'PWS–1'). PW1 further testified that the trades were confirmed upon execution by the issuance of the contract notes and contra statements as written confirmation of the transactions and that subsequently monthly statements were sent to the defendant at his address as stipulated in the margin trading facility agreement (Questions 34, 35, 36, 43, and 44 of 'PWS–1'). Of significance would be this. That all these were corroborated by the defendant himself during cross-examination notwithstanding that the corroboration was limited only to the 'receipt of one or two of the monthly statements' as reflected at p 25 of the notes of proceedings.

[15] Without further ado, PW1 categorically stated that at no time did the defendant dispute the purchases as stated in his account (Questions 39 and 47 and the answers thereto of 'PWS–1'). Of pertinence is the statement on the contract note stating that the client is entitled to dispute the contract within 24 hours of receipt and on the monthly statement there is an averment that the client is entitled to dispute the transactions within 14 days of receipt thereof (Questions 37 and 45 of 'PWS–1' together with the answers thereto).

[16] PW1 testified further and this was what he said. That in accordance with the terms of the margin trading facility agreement, the current equity ratio of the account was not supposed to drop below 200% (Question 48 and the answer thereto as seen in 'PWS–1') and that should it drop to the level of 165%, then the plaintiff is supposed to issue a margin call notice to the defendant requesting that he top up his collateral (Questions 49 and 55 of 'PWS–1' together with p 23 of the notes of proceedings). Further, if the current equity ratio drops to 130%, the plaintiff is to force-sell the shares

(Questions 25 and 55 of 'PWS–1' and the answers thereto and p 23 of the notes of proceedings).

[17] PW1 confirmed that when the current equity ratio of the defendant's account dropped to 164.74%, a margin call notice was issued to the defendant on 7 November 1997. Indeed, the issuance of this margin call notice or its validity for that matter is not in dispute and has been accepted as part and parcel of the evidence. This is the concession on the part of the defendant in the course of the submission.

[18] Now, upon issuance of this margin call notice, PW1 testified that the defendant made payment by way of a cheque in order to return and stabilise the current equity ratio (Question 53 and the answer thereto of 'PWS–1').

[19] But sometime in mid November 1997, the current equity ratio dropped again and this time it went as low as 130% and in accordance with cl 8.02 of the margin trading facility agreement, the plaintiff had no choice but to force-sell on 4 December 1997 (Question 55 and the answer thereto of 'PWS–1'). It is germane, at this juncture, to reproduce cl 8.02 of the margin trading facility agreement:

> Section 8.02 Power of Sale if Required Equity Ratio not maintained
>
> Notwithstanding any other provision herein or in any or the other security documents contained and without prejudice to any other right or remedy of the company, in the event that the company shall determine that the current equity ratio is below one hundred and thirty percent (130%) then the company may and is hereby expressly authorised to forthwith or at any time whilst such circumstances are continuing notwithstanding that a margin call has been made pursuant to s4.05 hereof and the period for furnishing additional security has not expired, without giving any prior notice to the client sell or release the mortgaged securities or any part thereof in such manner and upon such terms and conditions as the company shall think fit and to apply the proceeds thereof in reducing the debit balance. The company shall not be responsible for any loss from or through any brokers or others employed by the company in the sale of any of the mortgaged securities or for any loss or depreciation in the value of any such mortgaged securities arising from or through any cause whatsoever.

[20] That sums up what the plaintiff should do and has done.

[21] Contra losses accrued and the margin trading facility accorded to the defendant was then terminated on or around 29 April 1998 as reflected in exh P8 (Questions 56 and 58 of 'PWS–1' and the answers thereto). Of course, demand for the losses were also made by the plaintiff as per Question 65 of 'PWS–1' and the defendant has magnanimously admitted receipt of that demand as reflected at p 25 of the notes of proceedings.

[22] In a nutshell, the case against the defendant may be stated in this way:

(1) that the defendant had utilised the margin account;

(2) that there was a margin trading facility agreement with all the terms governing the conduct of the same as stated therein;

(3) that the plaintiff had made the requisite margin call when the equity ratio fell to 164.74% and in mid November 1997 the equity ratio dropped to 130%;

(4) that force-selling commenced on 4 December 1997;

(5) that there was contra losses due to the plaintiff and the margin facility given to the defendant had been terminated on or around 29 April 1998 and that the plaintiff had demanded for the losses; and

(6) that the evidence of PW1 coupled with PW1's witness statement in 'PWS–1' as well as the documentary evidence had established a case against the defendant.

THE DOCUMENTARY EVIDENCE

[23] I will now proceed to refer to the documentary evidence produced during the trial.

[24] In establishing the quantum of its claim, the plaintiff proceeds to produce the following documentary evidence which were admitted and undisputed by the defendant:

(a) the monthly statements which reflect all the transactions conducted in the margin account including the forced sales;

(b) the margin call notice dated 7 November 1997;

(c) the letter of termination; and

(d) the margin limit violation letter.

[25] It is pertinent to note that the addresses on all the monthly statements, margin call notice, letter of termination and margin limit violation letter which the defendant has denied receipt thereof, is:

(1) identical;

(2) confirmed by the defendant in cross-examination to be accurate and that it belongs to him as per pp 24 to 25 of the notes of proceedings; and

(3) it is identical to that as contained in the writ of summons and the letter of demand which the defendant has admitted in receipt thereof.

[26] Taking the *viva voce* evidence of PW1 together with the documentary evidence, it is part and parcel of my judgment and I so hold that the plaintiffs claim against the defendant has been established. In this regard, reference to the case of *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697 should be made. There Augustine Paul JC (now JCA) aptly said at p 706 of the report:

It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party (see *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4; *Wong Chong Chow v Pan-Malaysian Cement Works Bhd* [1980] 2 MLJ 75 and *Johara Bi bte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139). What shifts is the responsibility of adducing evidence to discharge that burden (see *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86). When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. No adverse inference can be drawn against that party for failure to give evidence himself. If he does not adduce any evidence when the burden has shifted to him, he will fail.

[27] The expression 'burden of proof has been bandied around by legal experts the world over. It is an expression which is self-explanatory. It is nothing more than the obligation to prove. The standard of proof required to discharge the legal burden depends largely on whether the proceedings are criminal or civil. In a criminal case, the standard required of the prosecution is proof 'beyond reasonable doubt'. In a civil case, like the present case at hand, the standard required is proof 'on the balance of probabilities'. The phrase 'legal burden' may be defined as the obligation that is imposed on a party to prove a fact in issue. And whether a party has discharged this legal burden and proved a fact in issue is decided by the tribunal of fact at the end of the case when both parties — referring to the plaintiff and the defendant, have called all their evidence. A party who fails to discharge the legal burden will lose his case.

[28] On the other hand, the phrase 'evidential burden' is often referred to as the 'burden of adducing evidence'. It obliges a party to adduce sufficient evidence of a fact in order to justify a finding on that fact in favour of the party who is so obliged. Bluntly put, it obliges a party to adduce sufficient evidence for the issue to be transmitted to the tribunal of fact. The evidential burden is said to be discharged when there is sufficient evidence to justify a favourable finding by the tribunal of fact. Just like the legal burden, the evidential burden may be said to shift. Where a party discharges an evidential burden in relation to a particular fact, his adversary will be under an obligation to adduce counter-evidence in order to convince the tribunal of fact in his favour. If the adversary refuses to adduce the counter-evidence, he runs the risk of the tribunal of fact coming to a finding on that issue in favour of the other party. It is in this sense that there is a shifting of the evidential burden (see the speech of Lord Goddard CJ in *R v Matheson* [1958] 1 WLR 474 at p478 (CCA)). It seems to me that the evidential burden only needs to be considered by the court on two occasions. Firstly, at the very beginning of the trial in order to determine which party starts first. Secondly, in the course of the trial, the judge trying the case will have to determine whether sufficient evidence has been adduced to leave an issue for the tribunal of fact to decide.

[29] Reverting back to the question of the legal burden, the pertinent question of which party that should bear the legal burden is usually determined by the rules of substantive law as set out in the relevant precedents and statutes. Asa general rule, in order to determine as to where the legal burden should fall, it is always prudent to apply the common sense approach. Thus, if certain facts are essential to the claim then the claimant in civil proceedings must prove them. It is always useful to remember the maxim that 'he who asserts must prove' — *ei incumbit probatio qui dicit, non qui negat.* A classic example would be the case of *Wakelin v London and South Western Railway Co* (1886) 12 App Cas 41 (HL). That was a case where a widow brought an action in negligence under the Fatal Accidents Act 1846. The evidence adduced was that her husband had been found dead near a level crossing at the side of the railway line. Lord Halsbury LC held that the widow carried the burden of proving that her husband's death had been caused by the defendants' negligence and that if she could not discharge that burden, she failed. Lord Halsbury LC even went to the extent of assuming that even if the husband had been knocked down by the train while at the crossing, yet the evidence adduced was capable of leading to the conclusion that the husband had been negligent as well. For that reason, Lord Halsbury LC held that the defendants' negligence was not proved.

[30] Applying the principles of law as set out above, it is my judgment that the burden shifts onto the defendant to disprove the plaintiffs case. And the defendant must discharge that burden by way of:

(1) cross-examination of the plaintiff s witnesses; and

(2) by adducing evidence through the testimony of the defendant or through the defendant's witnesses.

[31] What is the meaning of the phrase 'cross-examination'? It is the questioning of a witness, immediately after his examination-in-chief, by the opponent of the party calling him (here by the defendant who is the opponent of the plaintiff) or by any other party to the proceedings. It would be ideal to refer to cases like *R v Sharp* [1993] 3 All ER 225 (CA); and *R v Roncoli* [1998] Crim LR 584 (CA) in order to ascertain the extent to which a Judge may intervene in the course of cross-examination. It is a correct assertion to say that all witnesses are liable to be cross-examined. There should be expeditious despatch in cross-examining a witness because if the witness dies before cross-examination, his evidence-in-chief becomes admissible although little weight may be attached to it (*R v Doolin* (1882) 1 Jebb CC 123). I am fortunate that the trial proceeded in an expeditious manner and the parties were cross-examined and re-examined in an orderly fashion. Section 137 of the Evidence Act 1950 enacts as follows:

(1) The examination of a witness by the party who calls him shall be called his examination-in-chief.

(2) The examination of a witness by the adverse party shall be called his cross-examination.

(3) Where a witness has been cross-examined and is then examined by the party who called him, such examination shall be called his re-examination.

[32] Then there is s 138 of the Evidence Act 1950 and it enacts as follows:

(1) Witnesses shall be first examined-in-chief, then, if the adverse party so desires, cross-examined then, if the party calling them so desires, re-examined.

(2) The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

[33] In *Phipson on Evidence* (11th Ed) at para 1544, the learned authors suggest examples by way of an exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, namely, where the story is of itself an incredible or romancing character or that an abstention arises for the sake of convenience in order to save time and in a situation where several witnesses are called to testify on the same point and there is no necessity to cross-examine them at all. In the context of this trial before me, the failure to cross-examine proves fatal. It is only right and proper that witnesses should be challenged in the witness box so that it is announced to the whole world at large, so to speak, that the evidence tendered has been challenged and is not accepted. When the opponent has declined to put his essential and material case in cross-examination, just like the present case at hand, then it must follow as the night the day that he believed the testimony that has been given and that he could not dispute that evidence at all (*AE Carapiet v AY Derderian* (1961) Cal 359).

[34] There are three situations where witnesses may not be cross-examined. The first situation would be where the witness who is not sworn but merely called to produce a document like the case of *Summers v Moseley* (1834) 2 Cr & M 477. Such a witness may not even be cross-examined if he was sworn unnecessarily (*Rush v Smith* (1834) 1 Cr M & R 94). Under our Evidence Act 1950, s 138(1) speaks of viva voce examination of witnesses in three stages. Sub-section (2) of s 138 of the Evidence Act 1950 prescribes the scope of the three stages of examination. The examination-in-chief must always relate to the relevant facts. But the cross-examination need not be confined to the

facts to which the witness has testified on his examination-in-chief. However, it is always prudent that the cross-examination must relate to the relevant facts. Sub-section (3) of s 138 of the Evidence Act 1950 deals entirely with the scope of re-examination and it may be divided into two parts. The first part states that the re-examination shall be directed to the explanation of the matters referred to in cross-examination. While the second part states that if a new matter is introduced in re-examination then with the leave of the court, the adverse party may further cross-examine upon that matter. Sub-section (4) of s 138 of the Evidence Act 1950 specifically deals with the recall of a witness for further examination-in-chief or cross-examination. Now, on reflection, bearing in mind the framework of our Evidence Act 1950, it is perhaps of little significance to rely on *Summers v Moseley* because a witness who is not sworn cannot give evidence. Even though a witness is supposed to tender a document, that witness must be sworn.

[35] The second situation where a witness need not be cross-examined would be when that witness has been called by mistake. Such a mistake would occur when it is discovered that the witness is unable to speak on the matters which are supposed to be within his knowledge and the mistake is discovered before the examination-in-chief has begun but after the witness has been sworn. But, if counsel applies to withdraw a witness who can give relevant evidence but fearing that that witness might give damning evidence then the court would allow that witness to be cross-examined (*Wood v Mackinson* (1840) 2 Mood & R 273).

[36] The third and final situation where a witness need not be cross-examined would be when that witness has been called by the judge — the tribunal of fact and law. In that situation, neither party is entitled to cross-examine him without the leave of the judge. However, such leave should be given as a matter of course if the evidence is adverse to either party (*Coulson v Disborough* [1894] 2 QB 316 (CA); *R v Cliburn* [1898] 62 JP 232; and *R v Tregear* [1967] 2 QB 574 at p 580 (CA)).

[37] It is recognised that cross-examination is a powerful mechanism entrusted to counsel to utilise. But it should be conducted with some measure of restraint, courtesy and consideration to the witness (per Sankey LC in *Mechanical & General Inventions Co Ltd v Austin* [1935] AC 346 at p 360 (HL)). Lengthy cross-examination on matters that are not really in issue are frowned upon (*R v Kalia* [1975] Crim LR 181 (CA); and *Mechanical & General Inventions Co Ltd v Austin* at p 359 (HL)). Questions that are framed in such a way that it would invite argument rather than elicit evidence on the facts in issue are also frowned upon (per Lord Hewart CJ in *R v Baldwin* (1925) 18 Cr App R 175).

[38] Counsel conducting the cross-examination must put in the forefront two major purposes to achieve when cross-examining a particular witness. Itis this:

(1) to elicit evidence which would support his version of the facts in issue; and

(2) to cast doubt upon the evidence of that particular witness.

[39] Lawton J in *R v Sweet-Escott* (1971) 55 Cr App R 316 at p 320 sounded this sound advice:

> Since the purpose of cross-examination as to credit is to show that the witness ought not to be believed on oath, the matters about which he is questioned must relate to his likely standing after cross-examination with the tribunal which is trying him or listening to his evidence.

[40] Ultimately, the purpose of cross-examination is to show to the court that the witness ought not to be believed on oath.

CROSS-EXAMINATION OF PW1 BY THE NAME OF MOHAMAD ZAHAR BIN MOHAMAD SHARIF

[41] The defendant seeks to disprove the plaintiffs claim and to do so he must focus on this crucial issue:

> Why was the force-selling of the shares delayed till April 1998 or even July 1998?

[42] It is the stand of the defendant that the plaintiff has failed to force-sell the shares and this has resulted in the accrual of the contra losses. The defendant relies on the following facts to come to that deduction:

(1) that the plaintiff has delayed its force-selling; and

(2) that the plaintiff has failed to produce any evidence in order to fortify its contention that force-selling had indeed been carried out.

[43] Under cross-examination, PW1 testified to the following set of facts:

(a) that when the current equity ratio dropped to 164.74%, a margin call notice was issued (see p 13 of the notes of proceedings);

(b) that in accordance with the margin call notice, the defendant was to rectify this position within three days (see p 13 of the notes of proceedings);

(c) that the defendant had made the payment on 12 November 1997 (see p 13 of the notes of proceedings);

(d) that payment had not been made on 10 November 1997 as it was the weekend (see p 13 of the notes of proceedings);

(e) that subsequently, the current equity ratio returned for a short duration and plunged further to 130%;

(f) that the plaintiff then proceeded to force-sell on 4 December 1997, however, the defendant contended that there is not a shred of evidence

to show that force-selling had been done, but, on the contrary, there is evidence of force-selling and this can be seen at p 31 of exh P5 which clearly shows 'Sales CDS' and, consequently, the defendant's contention is totally devoid of merit for the following reasons:

(i) that no evidence was tendered to rebut the fact of force-selling of the shares;

(ii) that no documentary evidence was tendered to rebut the contention that force-selling had indeed been carried out on 4 December 1997; and

(iii) that DW1 (defendant) in his testimony made a bare statement that the plaintiff has failed to force-sell the shares without any basis whatsoever.

(g) there was no collateral in the defendant's account in April 1998 or July 1998.

[44] In my judgment, by way of answering the crucial question posed earlier, I must hold that force-selling of the shares were not delayed till April 1998 or July 1998 but, in fact, it had commenced on 4 December 1997. It is germane to mention that no challenge was mounted against PW1's testimony that force-selling had indeed commenced on 4 December 1997. It must be recalled to mind that PW1 was merely asked as to when force-selling commenced and upon providing the answer, no further questions were asked pertaining to the force-selling of the shares. It must be borne in mind that PW1 was not asked further in regard to the details of the force-selling of the shares or otherwise. I must, consequently, hold that the failure to challenge the testimony of PW1 amounts to an abject acceptance of the same. Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC) aptly said at p 213 of the report:

> .... there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[45] The defendant contended that exhs P8 and P9 suggest that force-selling had not been carried out because the wordings of these letters merely requested the defendant to top up his collateral. But with respect, these documents — referring to exhs P8 and P9, do not bear this out. It is exh P5 that shows the initial force-selling, while exhs P8 and P9 categorically show that requests were made to the defendant to enable him to rectify the position.

[46] It is germane to mention that the plaintiff is under no obligation whatsoever, whether contractually or legally, to wait for the share prices to rise. The shares were required to be sold at the prevailing market price and that was indeed done on 4 December 1997. According to the case of *Yii Ming Sung v Sarawak Securities Sdn Bhd* (2000) 1 LNS 38, the failure to liquidate the

margin account cannot constitute a defence to the claim and that the rules of trading as set out in the KLSE rules gave an absolute discretion to decide whether and when to force-sell without giving any notice.

[47] I will now proceed to allude to the testimony of the defendant (DW1).

DW1'S EVIDENCE

[48] Under examination-in-chief or cross-examination, DW1 failed to tender any evidence, be it oral or documentary, to show that:

(1) the plaintiff failed to make the request to top up the collateral (in fact, it has been admitted by the defendant in the course of his submission that the issuance of the margin call notice and its validity are not in issue);

(2) the plaintiff failed to take the necessary steps to liquidate the margin account; and

(3) the plaintiff failed to force-sell the shares on time which resulted in losses accruing in the defendant's account.

[49] In my judgment, the issuance of exhs P7, P8 and P9 and the commencement of force-selling on 4 December 1997 clearly show that efforts were taken by the plaintiff to liquidate the defendant's margin account. I must in evaluating the veracity and truthfulness of DWl's testimony address myself to the conduct of a reasonable man upon discovery that his trades had caused losses to his account. In such circumstances, the reasonable man would first call his dealer's representative and clarify the matter. Instead of acting like what a reasonable man should do, the defendant merely remained silent after receiving the monthly statements as per exh P5, and now the defendant has chosen to make a bare and categorical denial of any responsibility. That does not augur well for the defendant. It doesn't put the defendant in good light at all.

[50] Out of deference to the defendant, I must now state the defendant's case briefly.

[51] The essence of the defendant's case is that the plaintiff had failed to comply with the terms and conditions as stated in the margin trading facility agreement as per exh P4 and not because the force-selling of the shares was delayed till April 1998 or even July 1998.

[52] The defendant says that by failing to comply with their end of the bargain as set out in the margin trading facility agreement as per exh P4, the plaintiff could no longer recover their loss by suing the defendant under whatever pretext. The defendant further says that the documentary evidence put forward by the plaintiff together with the testimony of the witnesses show the reverse position in that it is the plaintiff who is now owing the defendant.

[53] It is the stand of the defendant that the margin facility agreement as per exh P4 had been prepared in compliance with r 20(10) of the KLSE Rules For Trading By Member Companies. The defendant then proceeds to submit along the following lines. That r 20(14) of the KLSE Rules For Trading By Member Companies states that a member company shall not permit the equity in any client's margin account to fall below 130% of the outstanding balance. That r 20(15) of the KLSE Rules For Trading By Member Companies further states that in the event that the equity falls below 130% of the outstanding balance, the member company shall have absolute discretion and, without notice to its client, liquidate his margin account, including the securities purchased and carried in such account, so that the equity is not less than 150% of the outstanding balance.

[54] On behalf of the defendant, it has been submitted that PW1 has admitted in court that the plaintiff would have to abide by the KLSE Rules For Trading By Member Companies as reflected at p 13 of the notes of proceedings. And that s 8.02 of the margin trading facility agreement as per exh P4 is the provision that provides that the plaintiff has to comply with the requirements of r 20(10), 20(11), 20(14) and 20(15) of the KLSE Rules For Trading By Member Companies. It is because of this that the defendant says that the plaintiffs contract in respect of the defendant's margin account is governed by the rules and regulations of the KLSE particularly r 20 of the KLSE Rules For Trading By Member Companies. The defendant says that he agrees that the breach of the rules of the KLSE would be a matter between the plaintiff and KLSE but the defendant proceeds to say that when the rules of the KLSE are incorporated in the margin trading facility agreement as per exh P4, then the breach would become a breach of contract between the plaintiff and the defendant.

[55] The defendant then proceeds to submit along these lines:

(1) that margin trading is a mode of transaction peculiar to share trading and that is why rules were formulated by KLSE to regulate the matter;

(2) that KLSE requires that in the agreement between the broker and the client there must be provisions stating that the parties would comply with r 20 of the KLSE Rules For Trading By Member Companies;

(3) that the proper approach in construing the terms of the margin trading facility agreement in exh P4 and the KLSE Rules For Trading By Member Companies would be the purposive interpretation as stated by the Court of Appeal in the case of *Akberdin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2002] 4 CLJ 689;

(4) that a strict adherence to the terms of the margin trading facility agreement is required because the amount involved in margin transaction can be staggering; and

(5) that the plaintiff has failed to comply with the terms and spirit of the margin trading facility agreement as per exhibit P4.

[56] The defendant has pleaded in para 4(c) of the amended statement of defence that the plaintiff owes a fiduciary duty and a contractual obligation to the defendant. The plaintiff, on the other hand, submits that the duty owed by the plaintiff is only contractual in nature. The defendant submits that the legal relationship between a broker and his client is both fiduciary and contractual. According to the defendant, fiduciary means that the sharebroker acts not for himself but rather for his client. And that the sharebroker gets his commission while the client expects to reap profit from his trading. The defendant submits further along these lines:

(1) that in a margin trading, it is very obvious that the rules of the KLSE are meant to protect both the broker and the client;

(2) that the broker, in the pursuit of his commission, must also ensure that the client's interests are protected by insulating the margin account with adequate security; and

(3) that in order to achieve the desired goal, the broker must ensure that the shares must be sold according to rule 20 (15) of the KLSE Rules For Trading By Member Companies so that the client will get his 30% of the value of the security and the broker will get back his loan of 100%.

WHETHER THE PLAINTIFFS CONDUCT IN RESPECT OF THE DEFENDANT'S ACCOUNT IS BOUND BY THE RULES AND REGULATIONS OF THE KLSE?

[57] The conduct of the defendant's account is bound by the rules and and regulations of the KLSE. The plaintiff has throughout the course of maintaining the defendant's account has complied dutifully with the rules and regulations of the KLSE. No evidence has been tendered by the defendant to show that the rules and regulations of the KLSE has been violated. The defendant contends that there has been a violation of rr 20(13), 20(14) and 20(15) of the KLSE Rules For Trading By Member Companies. But, in reality, there has been no violation of the said rules and regulations by the plaintiff at all. The factual matrix indicates the following state of affairs:

(a) there has been the issuance of the margin call as reflected in exh P7;

(b) that the commencement of force-selling took place on 4 December 1997;

(c) that there is an issuance of the letter of termination dated 29 April 1998; and

(d) that there has been the issuance of the letter of margin limit violation dated 17 December 1998 as reflected in exh P9.

[58] All these clearly show the steps taken by the plaintiff to liquidate the defendant's margin account. It must be borne in mind that the onus of rectifying the account lay with the defendant himself and he has miserably failed to do so. The defendant has failed to adduce any evidence to show that reasonable efforts have been made by him to ensure that the plaintiff did force-sell the shares in accordance with the rules and regulations of the KLSE. In any event, it is my judgment that a breach of the said rules and regulations of the KLSE does not invalidate a contract between the defendant and the plaintiff or any contract or share transaction entered into by the parties thereto (*Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253 (FC); *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* 2 MLJ 621 (CA); *OCBC Securities Pte Ltd v Yeo Siew Huan* 2 [1998] SLR 965 (HC S'pore); *UMBC Securities Sdn Bhd v Tan Chee Aan* [2001] 3 AMR 2958, HC Malaysia; and *TA Securities Bhd v Lee Wai Ying (P)* [1999] MLJU 394 (HC Malaysia).

WHETHER THE PLAINTIFF'S DUTY TOWARDS THE DEFENDANT'S ACCOUNT IS FIDUCIARY OR CONTRACTUAL IN NATURE?

[59] In the beginning of this judgment, I did say that everything depends on the facts of the case before one can classify the relationship between two parties as either fiduciary or contractual. Here, the facts leaned in favour of a contractual relationship between the plaintiff and the defendant. This is clearly borne out by the contracts executed between the plaintiff and the defendant.

[60] I am aware of the clarion call by Chong Slew Fai CJ (Sabah & Sarawak) in *New acres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 AMR 1730, 1762 to apply the concept of fiduciary relationship in commercial cases. With respect, I decline to do so. The facts here are entirely different from that of *Newacres*. Here, the relationship between the parties are entirely contractual. Nothing more and nothing less.

WHETHER THE DEFENDANT HAS ANV KNOWLEDGE THAT THE CURRENT EQUITY RATIO HAS DEPRECIATED BELOW 130% ON 7 NOVEMBER 1997?

[61] The defendant knew that the current equity ratio has depreciated below 130% on 7 November 1997. It is a known fact to the defendant. In fact, the defendant has been notified through a margin call notice dated 7 November 1997 as seen in exh P7. The defendant has knowledge of such notification. And the defendant too agrees with this proposition as is reflected in his submission.

THE CONTRACT NOTES AND THE MONTHLY STATEMENTS

[62] It must be emphasised that from the outset that the testimony of PW1 that all the contract notes and monthly statements in P5 reflecting the transactions and force-sales would have been sent out in the ordinary course of business to the defendant was not challenged during cross-examination.

[63] With this scenario in mind, there exists the unrebutted presumption that the contract notes and monthly statements were sent out to the defendant in the ordinary course of the plaintiffs business. These are voluminous documents and they were not produced during the trial and this very fact was confirmed by PW1 in his witness statement in 'PWS–1' at Question 34 thereto. The failure to produce these documents ought not to militate against the plaintiffs case for the following reasons:

(a) the defendant failed to challenge the plaintiffs witness's testimony to the effect that the contract notes would have been sent out in the ordinary course of business;

(b) the defendant is not denying receipt of the contract notes; and

(c) the defendant is not denying that the transaction existed or that it had been executed.

[64] The sum total of it all would be this. That it is inherently improbable that the defendant did not receive the contract notes and the monthly statements given the following state of affairs:

(a) the addresses on these contract notes and monthly statements are identical to the address of the defendant as stipulated in the writ of summons where service was effected onto the defendant;

(b) the defendant received the letter of demand at that address;

(c) the defendant also received the writ of summons at that address; and

(d) the defendant was docile and raised no dispute pertaining to these documents.

THE DEFENDANT'S COUNTERCLAIM

[65] A counterclaim against the plaintiff, like the present case at hand, is in fact a cross-action which is being tried with the original action and the roles of the parties are being reversed but the procedure remains the same. It is a correct proposition of the law to say that the defendant may counterclaim against the plaintiff and the plaintiff may file a defence to the counterclaim. Of course, the plaintiff may apply to have the counterclaim struck out or to be tried separately (O 15 r 5 (2) of the Rules of the High Court 1980 ('RHC')), and the court can even order a stay of the defendant's counterclaim (*Chuan Hup Agencies Pte Ltd v Global Minerals (Sarawak) Sdn Bhd* [1990] 1 MLJ 305).

[66] In his counterclaim, the defendant prays for judgment against the plaintiff on the following terms:

(a) special damages in the sum equivalent to 30% of the securities value pledged by the plaintiff under the margin trading facility account dated 7 November 1997;

(b) general damages for breach of contract;

(c) interests;

(d) any relief that the court deems proper; and

(e) costs.

[67] The plaintiffs defence to the counterclaim is rather simple. It is that the plaintiff denies para 9 of the counterclaim. The plaintiff repeats its entire statement of claim and prays that the counterclaim be dismissed with costs.

[68] I will now proceed to examine the defendant's counterclaim.

[69] It is the contention of the defendant that he is entitled to the sale proceeds in the region of 30%. However, the basis for this entitlement is not set out. Neither does the account application form nor the letter of offer nor the margin trading facility agreement in P4 provide for such division.

[70] The defendant has failed to comprehend that the sales of the shares in the margin account has led to a contra loss and not a gain. Be that as it may, DW1 in his witness statement ('DWS–1') has not set out the basis of his counterclaim. In fact, the evidence given to the effect that the defendant has suffered losses of 30% is devoid of particulars. There is no basis for such a counterclaim and it is unsupported by any document. It must be emphasised that the right to make a claim for 30% is not supported by exhs P1, P3 or even P4. And this is confirmed by PW1 at p 18 of the notes of proceedings. For these reasons, the defendant's counterclaim must be dismissed forthwith with costs.

[71] Going on an uphill task, the defendant valiantly raises the following issues:

(1) that there cannot be a claim for contra losses as prayed for by the plaintiff;

(2) that the plaintiff has failed to produce evidence of force-selling of the shares; and

(3) that the plaintiff did not force-sell the shares in the account of the defendant.

I must now examine these issues, one after another.

THE FIRST ISSUE

[72] It is the submission of the defendant that there cannot be a claim for contra losses as prayed for by the plaintiff and that such a prayer as envisaged by the plaintiff is totally erroneous. However, in deciding this issue, it is imperative to take stock of the following scenarios:

(a) this issue was not even raised as an issue to be tried;

(b) this issue was not raised as a preliminary issue nor as a substantive issue at the commencement of this suit or trial of this action;

(c) of pertinence is the fact that this issue was not pleaded at all in the defendant's defence;

(d) this issue was not even put to PW1 nor raised through DW1 during his examination-in-chief; the defendant submits through his counsel that PW1 agreed that contra gains and contra losses fall under the operation of a trading account and this seems to suggest that contra losses do not appear in the margin account; and I am of the considered view that such a submission is highly misleading given the fact that PW1 had said by way of a response under cross-examination as reflected at page 10 of the notes of proceedings the following:

> S: Jadi di dalam trading sedemikian rupa, jika tidak dibayar akan dijual. Dan keuntungan atau kerugian di kaunter tersebut dipanggil keuntungan contra atau kerugian contra. Setuju atau tidak?
>
> J: Setuju.

and this suggests that margin accounts, contra gains and contra losses exist;

(e) it must be borne in mind that PW1 was never asked that contra losses do not fall under the operation of a margin account and the same line of questioning was not led through DW1; and

(f) all the submissions by the learned counsel for the defendant are submissions from the bar and unsubstantiated and that the manner in which contra trading works in margin account ought to have been derived from either the witnesses or from the documentary evidence to be tendered during the course of the trial and, sad to say, this was not done and so all the submissions pertaining to the question of 'what the plaintiffs claim is all about?' are mere submissions from the bar.

[73] Now, the manner in which the plaintiffs claim has arisen is clearly set out in the statement of claim. To be precise, para 5 of the statement of claim reflects the plaintiffs claims and it may, briefly, be stated as follows:

(1) that the current equity ratio of the defendant's account deteriorated to below 130% in or around 7 November 1997;

(2) as a result of this deterioration, the plaintiff then issued a margin call letter to the defendant in or around 7 November 1997;

(3) since the defendant failed to make the requisite topping up, force-selling commenced and losses accrued due to the force- sale of the shares in the account; and

(4) due to the losses and the defendant's failure to make payment for the outstanding sum as demanded, the plaintiff then terminated the margin trading facility in consonance with cl 8.01 of the margin trading facility agreement as per P4.

[74] It is the submission of the defendant that the plaintiffs letter issued on 29 April 1998 in order to terminate the margin trading facility agreement ought to reveal that the account should have been crystallised. Unfortunately, this submission suffers from the following impediments:

(1) that it is a submission from the bar;

(2) that no challenge was made to the evidence of PW1 by putting to PW1 that the account ought to have been crystallised;

(3) that such evidence was not led through DW1; and, consequently,

(4) that submission of this nature is both baseless and totally without foundation.

[75] Exercising its legal right in accordance with cl 8.02 of the margin trading facility agreement as per P4, the plaintiff forthwith files its claim in this court. Hence, the present trial.

[76] The sting of the plaintiff s claim may be stated in this way. That the defendant's submission that there cannot be a claim for contra losses as prayed for by the plaintiff is totally devoid of merits for the following salient reasons:

(a) that this was never raised by the defendant as an issue for adjudication;

(b) that this fact was not pleaded; and

(c) that this fact was not put to PW1 nor led through DW1.

THE SECOND ISSUE

[77] It is wrong to say that the plaintiff has failed to produce evidence of force-selling. In reality, the plaintiff merely failed to produce the contract notes due to its voluminous size. In any event, the defendant has knowledge of the force-sale as there has been no denial of receipt of the contract notes evincing the force-sale. I must at once say that the plaintiff had, at all material times, tendered evidence of its force-selling and this can readily be seen at exh P5 which mirrors the transactions and the force sales. It must be emphasised that exh P5 clearly shows the transactions on a monthly basis on the force-selling conducted by the plaintiff and PW1 has even confirmed this through his evidence. It must be borne in mind that exh P5 was:

(i) not challenged by counsel for the defendant;

(ii) and not even put to DW1; and

(iii) was left unchallenged and must be deemed to be admitted.

[78] As I said earlier, support can be drawn from the authority of *Wong Swee Chin v Public Prosecutor* for the proposition that the failure to cross-examine a witness on the most important aspect of the case would tantamount to an acceptance of that witness's testimony.

[79] It is submitted on behalf of the defendant that the monthly statements exhibited at exh P5 are not margin account statements at all but rather a summary of the defendant's accounts. In rebuttal, the plaintiff submits that the submission of the defendant is devoid of merit because the plaintiff does not keep any separate margin account statement. In fact, all that the plaintiff has in its records are monthly statements which are sent to their respective clients in the ordinary course of business. Even the defendant himself had admitted receipt of the monthly statements and this can surely be seen at p 25 of the notes of proceedings. I must reiterate that contract notes are regularly sent to the defendant and if the force-selling was not condoned or disputed by the defendant then surely the defendant would have objected to it upon receipt of the contract notes. But this was not done. The defendant remained docile throughout.

THE THIRD ISSUE

[80] It is essential to point out that the defendant's defence is not that the plaintiff failed to force-sell the shares in or around November 1997 but rather that the plaintiff failed to force-sell the shares in August 1997.

[81] It is wrong to say that the plaintiff did not force-sell the shares in the account of the defendant because:

(a) no mention was made nor evidence led through PW1 or DW1 with regard to this fact; and

(b) no documentary evidence was produced to substantiate this point.

[82] The defendant goes to the extreme and states that the plaintiff has not force-sold the shares in the account of the defendant and, consequently, the plaintiff has not complied with the requirements of the margin trading facility agreement in exh P4 which incorporates the KLSE rules. By way of a rebuttal the plaintiff states that all the terms of the margin trading facility agreement had been complied with and the following chronology of events would support that assertion:

(a) the defendant utilised the margin trading account;

(b) the current equity ratio of the margin trading account was not supposed to drop below 200% and that should it drop to 165%, the plaintiff is to issue the margin call to the defendant requesting the latter to top up his collateral and if the current equity ratio was to drop below 130%, the plaintiff is to force-sell the shares (this is even confirmed by the defendant as seen at p 23 of the notes of proceedings);

(c) the current equity ratio of the defendant's account dropped to 164.74% and a margin call notice was then issued on 7 November 1997 as per exh P7 and it must be emphasised that the issuance of the margin call notice is not in dispute and is accepted in evidence;

(d) upon issuance of the margin call notice, the defendant made payment by way of cheque for the sum of RM10,000 on 12 November 1997 (see p 13 of the notes of proceedings); and

(e) in mid November 1997, the current equity ratio dropped to 130% and the plaintiff then commenced force-selling on 4 December 1997.

[83] Some general observations must be made. The plaintiff is not under a duty to sell all the shares at one go. It is the plaintiffs duty to ensure that the best price is reached prior to the force selling of the shares.

[84] It is not true to say that the force-selling of the shares were delayed till April 1998 or July 1998. In fact, the force-selling had commenced on 4 December 1997. There was no collateral in the defendant's account in April 1998 or July 1998. It is pertinent to note that no challenge was made to PW1's testimony that force-selling commenced on 4 December 1997. PW1 was merely asked when force-selling commenced and upon providing an answer, no further questions were asked pertaining to the force-selling. Again PW1 explained to the court what sales CDS were as seen at p 31 of bundle 'F' and counsel for the defendant chose not to further cross-examine PW1 regarding the force sale despite the fact that it is the crux of the defendant's case.

[85] The trial proceeded smoothly and the notes of proceedings have been circulated to the parties. A perusal of the notes of proceedings would show the following events:

(a) that PW1 went on at extreme length in the course of the examination-in-chief to explain the mode of trading, the margin account, the margin calls and the plaintiffs compliance with the terms of the margin trading facility agreement as per exh P4;

(b) that PW1 was not challenged as to how and in what manner force-selling was done;

(c) that PW1 was only asked as to when force-selling was conducted;

(d) that PW1 was not cross-examined on how long force-selling took place prior to a loss situation having occurred;

(e) that PW1 was not challenged in terms of the plaintiffs evidence to show force-selling;

(f) that DW1 did not lead any evidence to show that the plaintiff had failed to force-sell its shares and in sharp contrast evidence of force-selling was produced and led through PW1; and

(g) that DW1 did not even challenge the plaintiffs move to force- sell the shares in his evidence.

[86] It is the defendant's submissions that the plaintiffs relationship with the defendant is of a fiduciary nature and that the plaintiff has failed to act in the best interest of the defendant as his client. All these submissions are well and good but, with respect, the defendant has tendered no evidence of the plaintiffs inability or the plaintiffs failure to protect the defendant's interest. In fact, the plaintiff has shown that it has taken the necessary steps to liquidate the defendant's account upon the shortfall of the collateral. What is in effect a contractual relationship between the plaintiff and the defendant on the strength of the margin trading facility agreement as per exh P4 has been misconstrued by the defendant as a fiduciary relationship. Their relationship is entirely contractual in nature. Nothing less and nothing more.

[87] To ascertain the rights and duties arising out of the relationship between the principal and agent one must refer to the contract, express or implied, which exists between them (*Love v Mack* (1905) 93 LT 352 (CA); and *Pole v Leask* (1863) 33 LJ Ch 155 (HL)). Here the recitals to the margin trading facility agreement in exh P4 states as follows:

> Article 1 Recitals
>
> Section 1.01 Application for Facility
>
> The client has applied to the company for margin trading facilities (hereinafter referred to as 'the Facility') for the purpose of providing financing to the client for the purchase of securities which may, at the time of such purchase, be listed on the Kuala Lumpur Stock Exchange.
>
> Section 1.02 Agreement to grant Facility
>
> The company has at the request of the client and the dealer agreed to extend and grant and or continue to make available to the client the facility upon the terms and conditions hereinafter appearing and such other terms and conditions as may be agreed to between the parties from time to time.

[88] The word 'client' would refer to the defendant while the word 'company' would refer to the plaintiff. The 'dealer' is referred to by her name as Uji Roziah bt Bachok @ Lati as stated in the Schedule. The recitals categorically show that the plaintiff provides financing to the defendant for the purchase of securities listed on the KLSE and to be transacted through the plaintiff subject to the terms and conditions as stipulated in the margin trading facility agreement. It is the defendant and the dealer that requested the plaintiff 'toextend and grant the facility upon the terms and conditions' stated in the margin trading facility agreement in exh P4. The existence of the relationship between the plaintiff and the defendant as reflected in exh P4 raises the implication of a contract involving certain rights and duties and the nature

and extent of the contract depend upon the circumstances of the particular case. Here, the evidence led in the course of the trial shows a contractual relationship between the plaintiff and the defendant. In *Shaw v Woodcock* (1827) 7 B&C 73, for instance, the facts raised therein showed an inference of a del credere agency. Nothing of that sort can be deduced from the facts of the present case. I have in the early part of this judgment referred to the case of *Bonds & Securities (Trading) Pty Ltd v Glomex Mines NX & Ors* which revolves on the issue of a fiduciary relationship. Even if I were to vigorously apply *Bonds's* case to the facts of the present case, the defendant here has failed to show how the plaintiff has not acted in the best interest of the defendant when the shares were force-sold on 4 December 1997.

CONCLUSION

[89] For the varied reasons as adumbrated above, I enter judgment for the plaintiff and against the defendant with costs. This means that the plaintiffs claims against the defendant are allowed with costs as sought for and in the following terms (see the prayers at the bundle of pleadings marked as 'D' at pp 24 to 25 thereof):

(a) the sum of RM336,399.35 being, contra losses, up to the 31December 1998;

(b) interest on the above contra losses as at 31 December 1998 amounting to the sum of RM5,714.02;

(c) further interest on the sum of RM336,399.35 at the rate of 20% per annum from 1 January 1999 calculated on a daily basis until the date of full and final settlement;

(d) bills (which include, *inter alia*, CDS transaction fees, Margin contra interest, Margin interest fees and Margin rollover fee) amounting to the sumofRM88,528.77;

(e) interest on the above bills as at 31 December 1998 for the sum of RM1,503.80;

(f) further interest at the rate of 20% per annum on the sum of RM88,528.77 from 1 January 1999 calculated on a daily basis until the date of full and final settlement; and,

(g) such further and other relief which this Honourable Court deems fit.

[90] Prayer (g) of the plaintiffs statement of claim is given effect) and ought not to be treated as a 'mere ornament' (borrowing the words of Salleh Abas FJ in *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 (FC) especially at p 160) and it is for this reason that I grant costs when entering judgment for the plaintiff. I too dismiss the defendant's counterclaim with costs.

[91] It would not be wrong if I were to make the following salient observations.

[92] The defendant's conduct, at the material time, taken together with his testimony reveals a man who is seeking to avoid financial liability for speculation that has gone wrong. Of course, there is an adage which says:

> If you don't speculate, you can't accumulate.

[93] In an attempt to **'**accumulate', the defendant 'speculated' in securities and his fingers got burnt in the process, so to speak. That is certainly unfortunate. According to Charles Lamb, in *The Two Races of Men*:

> The human species, according to the best theory I can form of it, is composed of two distinct races, the men who borrow and the men who lend.

[94] Unfortunately, the defendant here falls under the first category. Since he agreed to enter into a contract to finance the purchase of securities he must be held accountable to the plaintiff for the speculation that went wrong. This is my judgment and I so hold accordingly.

Plaintiff's claim allowed. Defendant's counterclaim dismissed.

Reported by Loo Lai Mee